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In The

# Supreme Court of the United States

October Term, 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R.T. DAVIS, Director of the Michigan Department of State Police,

*Petitioners,*

vs.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW AND JACK WELBORN,

*Respondents.*

**On Writ Of Certiorari To The Michigan Court Of Appeals**

## BRIEF AMICI CURIAE OF THE PEOPLE OF THE STATE OF ILLINOIS, ALABAMA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, IDAHO, IOWA KANSAS, KENTUCKY, MAINE, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA AND WYOMING

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## QUESTION PRESENTED

Where the Michigan courts concluded that the sobriety checkpoint program addresses an issue of legitimate public concern; that it would have some effectiveness; and that objectively it would be only minimally intrusive, is the checkpoint program facially unconstitutional in violation of U.S. Const. Amend. IV merely because the Michigan courts also found that it would not be as effective as other law enforcement methods and that it would have a potential for generating subjective surprise and fear in some motorists?

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## INTEREST OF THE AMICI CURIAE

Pursuant to Rule 36.5 of the Rules of this Court, the States identified above submit this brief as amici curiae in support of the Petitioner, Michigan Department of State Police.

The amici States, represented by their chief legal officers, strongly support Michigan's effort on behalf of the lives and safety of our citizens.

Each year more than 20,000 persons are killed in alcohol-related traffic accidents in this country. One in every four drivers involved in a fatal crash is drunk at the time. Traffic-related incidents are the largest single cause of death of individuals between the ages of 5 and 34. More than half of these deaths are alcohol-related.

The amici States are at war with this scourge. This war can only be won through a combination of arrest, deterrence and education. The amici States have determined that DUI roadblocks serve these functions with a minimal but necessary inconvenience to our motorists. We urge this Court to agree.

## SUMMARY OF THE ARGUMENT

DUI roadblocks are not *per se* unconstitutional. The reasonableness of a seizure under the fourth amendment must be determined by weighing the gravity of the public concerns served by the seizure, the degree to which the seizure advances those public interests, and the severity of the interference with individual liberty. *Brown v. Texas*, 443 U.S. 47 (1979).

Public concern over alcohol-related traffic accidents and deaths is both substantial and well-founded. The States are attempting to address this concern through a combination of innovative police tactics, steeper criminal sanctions and broad-based educational and public awareness programs.

Roadside safety checks and DUI (driving under the influence) roadblocks combine enforcement mechanisms with public awareness. As such, the States contend that roadblocks serve as an efficient and effective deterrent device. They not only result in DUI and other alcohol-related citations, but they often act in combination with public awareness campaigns to deter potential drinking drivers from getting behind the wheel at all. A study by the Illinois State Police, under the direction of Jeremy Margolis, indicates that roadside safety checks result in an efficient allocation of resources in the war against drunk driving.

Sobriety checkpoints are perhaps the most visible aspect of a crackdown on drunk driving and afford police the opportunity to contact greater numbers of motorists than during typical patrol procedures. The amici States contend that their use increases public perceptions of the likelihood that DUI offenders will be arrested and of the locality's commitment to the problem. It is this public awareness and the short-term deterrent effect which results from these campaigns which provide the state with a deterrent mechanism available from no other source.

Finally, the interference to individual liberty which results from these checkpoints is minimal. As illustrated by the facts of this case, there is nothing inherent in DUI



roadblocks that would preclude their operation in a manner causing only minimal intrusion on the motoring public. First, police implemented the roadcheck pursuant to established administrative procedures specifically designed to minimize intrusion. Second, the objective intrusion involved was certainly no more than that sanctioned in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1975). There motorists were not only stopped for a visual inspection of the vehicle and its occupants, but were subject to referral to a secondary inspection area for questioning and the possible production of documentation. This procedure averaged three to five minutes. 428 U.S. at 546, 547. Drivers in the present case were merely stopped while police explained the reason for the checkpoint and inspected their cars and persons only insofar as the officers could observe potential violations from without the vehicle. If no violations were detected, the entire process averaged less than twenty-five seconds. In addition, it is evident from the operation of this roadblock that the safety of the motorists was of paramount concern. The checkpoint area was lighted, and traffic controlled prior to the stop of an individual auto by use of reflectorized signs, orange cones and fusees which were used to funnel vehicles into one lane.

On the record presently before this Court, it is clear that specific criteria were utilized in determining the need for and location, timing, and duration of the roadblock. Individual discretion was minimal.

In conclusion, the amici States respectfully suggest that the thirty-second delay occasioned in these checkpoints is a very small price to pay for the knowledge that the vehicles around you meet essential basic safety standards and are being driven by sober licensed drivers.

## ARGUMENT IN SUPPORT OF MICHIGAN

### I.

### DUI ROADBLOCKS ARE NOT *PER SE* UNCONSTITUTIONAL.

The reasonableness of a seizure under the fourth amendment must be determined by weighing the gravity of the public concerns served by the seizure, the degree to which the seizure advances those public interests, and the severity of the interference with individual liberty. *Brown v. Texas*, 443 U.S. 47 (1979).

In *United States v. Brigoni-Ponce*, 422 U.S. 873 (1975), this Court applied these principles and held that the government's interest in apprehending illegal aliens does not outweigh the invasion of privacy occasioned by the use of roving patrols, which make wholly discretionary vehicle stops for brief questioning of occupants at non-border locations, where the effectiveness of such patrols would not be defeated by imposition of a reasonable suspicion requirement. However, a year later, this Court held that the same governmental objective outweighed the individual's privacy rights when effectuated by means of a permanent checkpoint which by its nature both appeared to involve and actually permitted less discretionary enforcement activity. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Similarly, although this Court has ruled that random stops to ensure compliance with licensing, registration and vehicle safety requirements were unconstitutional, *Delaware v. Prouse*, 440 U.S. 648 (1979), also assured that the states were not precluded from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. One possible alternative to



the roving patrol suggested by the Court was the questioning of all on-coming traffic at roadblock-type stops. *Id.* at 663. This alternative was specifically found permissible in *Texas v. Brown*, 460 U.S. 730 (1981), where police established a temporary routine driver's license checkpoint during the late evening hours.

As the appendix to the Petition for Writ of Certiorarai indicates, the overwhelming majority of state appellate courts that have faced the issue before this Court have rejected constitutional challenges to DUI roadblocks. *See* Petition at Appendix 165a.

Of the courts that have struck down implementation of DUI roadblocks, one did so explicitly on state statutory grounds, without addressing the constitutional issue. *See Commonwealth v. Tarbert*, 517 Pa. 277, 535 A.2d 1035 (1987). Four did so exclusively on state constitutional grounds. *See State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988); *City of Seattle v. Mesiani*, 110 Wash.2d 454, 755 P.2d 775 (1988); *State v. Boyanovsky*, 304 Ore. 131, 743 P.2d 711 (1987); *State v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985). Several of the courts ruling in these cases have implicitly recognized that this Court's decisions in *Brown* and *Martinez-Fuerte* weigh in favor of the constitutionality of roadblocks. Indeed, in striking the roadblock at issue before it, the New Hampshire high court stressed that the New Hampshire constitution affords "significantly greater protection than the fourth amendment against intrusion by the state." *Koppel*, 127 N.H. 291, 499 A.2d at 981.

Still another court which has struck down its state's use of DUI roadblocks indicated that it might approve a

roadblock if a judicial warrant authorizing one were obtained. *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976). However, *Olgaard*, which was decided prior to *Brown* and *Prouse*, presumed that *Martinez-Fuerte* required checkpoints to be permanent. In a later case, the South Dakota Supreme Court, citing *Prouse*, recognized that when wild game checks are operated so as to stop all vehicles with a clear showing of police authority, they do not entail the evils characterized by roving patrols. *State v. Halverson*, 277 N.W.2d 723 (S.D. 1979).

Other courts stressed the lack of an existing administrative plan to guide law enforcement officials in implementing checkpoints. The absence of such guidance allows police subterfuge or leads to the kind of unfettered police discretion disapproved by this Court in *Prouse*. E.g. *State v. Smith*, 674 P.2d 562 (Okl. Cr. 1984); *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986); *Webb v. State*, 695 S.W.2d 676 (Tex. App. 5th Dist. 1985) *aff'd* 739 S.W.2d 802 (Tex. Crim. 1987); *State v. Muzik*, 379 N.W.2d 599 (Minn. App. 1985).

Finally, while the courts in *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983), and *State v. Jones*, 483 So.2d 433 (Fla. 1986), indicated that properly instituted DUI roadblocks may well constitute reasonable intrusions under the fourth amendment, they found the checkpoints before them deficient because the records did not establish the stops as safe, effective, or as involving the exercise of minimal discretion by field officers. Indeed, almost all of the courts that have struck down particular roadblocks recognized that a properly instituted DUI roadblock may well constitute reasonable intrusion under the fourth amendment if they were



implemented safely, effectively, and pursuant to established administrative procedures. *Compare, e.g., People ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983) (striking down roadblock because police retained unfettered discretion) *with State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984) (upholding roadblock because concerns expressed in *Ekstrom* had been met).

Thus, the Michigan appellate court in this case, along with the New Jersey Superior Court, *see State v. Barcia*, 228 N.J. Super. 267, 549 A.2d 491 (1988), stand alone in holding that DUI roadblocks executed pursuant to either a legislative or administrative plan unequivocally violate the fourth amendment. All other courts that have struck down DUI roadblocks, on other than state constitutional grounds, have left open the possibility that a better conceived plan or better police execution might allow a DUI roadblock to pass constitutional muster.

Even those more general concerns expressed by the courts that rejected the use of roadblocks are not fatal to their constitutionality. For instance, *Texas v. Brown* makes clear that permanency of a roadblock is not a constitutional prerequisite. *See* 460 U.S. at 733. *See also United States v. Prichard*, 645 F.2d 854 (10th Cir. 1981) (license check); *United States v. Miller*, 608 F.2d 1089 (5th Cir. 1979) (license check); *United States v. Kaye*, 739 F.2d 488 (9th Cir. 1984) (alien check).

Neither must the public necessarily have prior knowledge of the specific operation of a roadblock, particularly where advance warning of the location and timing would undermine its effectiveness. *See Kaye, supra*. In *Martinez-Fuerte*, publication of the location and timing of

the stops did not significantly hinder their main purpose of detecting illegal aliens insomuch as the checkpoints were located on those important highways offering a safe and expeditious route to the interior, and violators who knew of the roadblocks were forced into less efficient, slower, and less traveled roads where they would be more vulnerable to roving patrols. A major purpose of sobriety checkpoints, however, is not only to apprehend drunk drivers before they kill or maim, but to deter those drivers from being on the roads in the first instance. *See* page 12-13, *infra*. Obviously, intoxicated persons will more likely be deterred from driving altogether if they cannot ascertain precisely where or when the law enforcement operation will be conducted.

What is essential in the context of an objectively limited stop such as those contemplated in *Martinez-Fuerte, Prouse* and *Brown* is that the checkpoint not appear to or actually involve a significant amount of discretionary enforcement activity. As the Court in *Martinez-Fuerte* emphasized, where traffic is detained in a regularized manner with a show of police authority, the motorist is able to perceive that he is not being singled out for inspection and may assume that the stops are duly authorized as serving the public interest. Further, since only those cars approaching the checkpoint may be detained, the potential for the harassment found in roving patrol stops is minimized. Finally, when the location and timing of a checkpoint is chosen by supervisory personnel responsible for determining the most effective allocation of limited resources, it may be assumed that the operation will not be located and timed so as to bear arbitrarily or oppressively on motorists as a class.



As illustrated by the facts of this case, there is nothing inherent in DUI roadblocks that would preclude their operation in a manner causing only minimal intrusion on the motoring public. First, police implemented the roadcheck pursuant to established administrative procedures specifically designed to minimize intrusion. Second, the objective intrusion involved was certainly no more than that sanctioned in *Martinez-Fuerte*. There, motorists were not only stopped for a visual inspection of the vehicle and its occupants, but were subject to referral to a secondary inspection area for questioning and the possible production of documentation. This procedure averaged three to five minutes. 428 U.S. at 546, 547. Drivers in the present case were merely stopped briefly to allow police to explain the reason for the checkpoint and to inspect their cars and persons only insofar as the officers could observe potential violations from without the vehicle. If the police detected no violations, the entire process averaged less than twenty-five seconds. Second, it is evident from the operation of this roadblock that the safety of the motorists was of paramount concern. The checkpoint area was lighted, and traffic was controlled prior to the stop of an individual auto by use of reflectorized signs, orange cones and fusees which were used to funnel vehicles into one lane.

On the record presently before this Court, it is clear that specific criteria were utilized in determining the need for and location, timing, and duration of the roadblock. This is precisely what this Court's prior decisions in *Martinez-Fuerte, Prouse,* and *Brown* require.

II.

## DUI ROADBLOCKS ARE AN EFFECTIVE AND EFFICIENT WEAPON IN THE WAR AGAINST DRINKING DRIVERS.

The amici states respectfully suggest that the analysis utilized by the Michigan Court of Appeals was incorrect. Relying on what it interpreted as a low actual arrest rate and an uncertain deterrent effect, the Court concluded that the program was not effective. The Court then went on to conclude that these perceived failures, in combination with the existence of more effective alternatives, caused the program to fail to qualify as a reasonable seizure under the Fourth Amendment.

Contrary to the finding of the Court below, however, the perceived existence of less intrusive, or arguably more effective, means of enforcement is not fatal to the procedure. This Court has consistently rejected the notion that seizures are constitutionally impermissible merely because less burdensome methods could conceivably be employed to effectuate the same governmental interests sought to be advanced. Rather, it is sufficient that a particular search or seizure amply served the important and legitimate interests involved. *Illinois v. LaFayette*, 462 U.S. 640, 647 (1983). *See also Martinez-Fuerte, supra*, 428 U.S. at 557, n. 12.

While the lower courts have properly recognized that roving patrols have proven to be a more effective means of attaining DUI arrests to some extent, it is nonetheless apparent that these measures, even when employed in conjunction with stiffer DUI penalties have not adequately addressed the problem of drunk driving.



An April 3, 1984, safety study published by the National Transportation Safety Board[1] ("NTSB") observes that despite the recent nationwide increase in legislative and countermeasure activity, roughly the same percentage (55%-58%) of all highway fatalities each year involve alcohol. (Study, p. 1) Data utilized by the study reflects that in 1982 alone, approximately 25,600 persons died in alcohol related accidents. Each year, nearly 670,000 persons are injured and some 1,200,000 accidents result in property damage. (Study, p. 1) Based upon (1) estimates of the probability of arrest for DUI varying from 1 in 200 drunk drivers to 1 in 2,000 and (2) a nationwide telephone survey indicating that between 1/4 and 1/3 of drinking drivers feel that the chances of apprehension and punishment are not great enough to prevent them from driving after drinking, the study concludes that many intoxicated drivers persist in their behavior because they perceive a low risk of arrest. (Study, p. 3)

Specifically with respect to DUI roadblocks, the NTSB study notes that while sobriety checkpoints may not be the most efficient arrest producing technique, data from the District of Columbia, Maryland and Delaware reflect that they do generate a significant number of DUI arrests. (Study, pp. 9, 10)

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[1] Report No. NTSB/SS – 84/01 entitled National Transportation Safety Board, Safety Study, *Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations* containing 63 pages available through the National Technical Informative Service, Springfield, Virginia 22161.

More important is the study's recognition of the deterrent potential for DUI roadblocks. First, they preclude drunk drivers from assuming that they can avoid police detection by simply driving cautiously. (Study, p. 5) Futhermore, where an individual is intoxicated, a self-evaluation of his ability to drive without manifesting his condition is certainly suspect. It is beyond dispute that a drunk driver's ability to avoid weaving along the roadways does not necessarily assure his ability to handle an emergency situation where quick perception and reflex are of paramount importance.

Moreover, sobriety checkpoints are perhaps the most visible aspect of a crackdown on drunk driving and afford police the opportunity to contact a greater number of motorists than during typical patrol procedures. Their use will thereby increase public perceptions of both the likelihood that DUI offenders will be arrested and the locality's commitment to addressing the problem. (Study, p. 9). See also *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073, 1076-77 (1984) (discussing deterrent advantage); *People v. Scott*, 63 N.Y.2d 518, 527, 473 N.E.2d 1, 4-5, 483 N.Y.S. 2d 649, 652-53 (1984) (same).

For instance, States often institute DUI roadblocks during holidays and at other times of the year when highway traffic is particularly high and when the potential impact of drunk driving on public safety is substantially greater.[2] These well-publicized roadblocks can be a significant short-term deterrent to drunk driving and, as

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[2] *See*, e.g., "Police plan beefed up Labor Day traffic enforcement," U.P.I. wire, August 27, 1986, Wednesday, BC cycle (Available on Lexis/Nexis):

(Continued on following page)



a result, bestow a significant benefit on the driving public. Therefore, contrary to the assertion of the lower court, the significant public benefit of *short-term* deterrence under such circumstances can neither be minimized nor denied. *See State v. Superior Court*, 691 P.2d at 1076-77 (stressing validity of proven short-term deterrence as a factor in favor of constitutionality "particularly . . . in light of the fact that a high percentage of alcohol related accidents traditionally occur in December"). *See also People v. Bartley*, 109 Ill.2d 273, 291-92, 486 N.E.2d 880 (1985) (same).

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> Illinois State Police will be beefing up traffic law enforcement over the Labor Day weekend, officials said Wednesday.
>
> State Police Superintendent Laimutis Nargelenas said police will be especially tough on drunk drivers. Road blocks to check for drunken driving are expected throughout the state, especially along the Illinois-Wisconsin border.
>
> The Illinois-Wisconsin line is known as the "bloody border" because of the large number of alcohol-related traffic accidents that occur along it.
>
> "More people will be traveling this weekend because gas is cheap, and that increases the odds for traffic fatalities," said Bob Fletcher, a spokesman for the Illinois State Police Department.
>
> * * *
>
> The increased traffic law enforcement begins Friday and will run through Monday.

*See also* U.P.I. Wire, May 18, 1987, Monday, BC cycle (Available on Lexis/Nexis) (reporting Illinois's institution of roadblocks over Memorial Day weekend).

The Michigan court, while finding that the roadblock in this case did have a short-term deterrent impact on drunk driving nonetheless held that it was not effective. However, as the Arizona Supreme Court recognized in *Superior Court*, if the State can prove short-term deterrence of drunk driving, it has established not only a valid purpose for a DUI roadblock, but has also demonstrated a particular kind of effectiveness. Thus, the Michigan court's conclusions that the roadblock was not effective is inherently contradictory to its finding that it had a short-term deterrent impact on drunk driving.

In any event, *Martinez-Fuerte* makes clear that where the selective referral of motorists for further investigation involves only minimal intrusion, it need not be justified by any particular reason, 428 U.S. at 559, 560, 563. *See also Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky. App. 1983) (where field officers' discretion in conducting DUI roadblock was found sufficiently constrained because all vehicles were stopped).[3]

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[3] In *Martinez-Fuerte*, the Court found that operation of the checkpoint there need not have been authorized by a warrant because (1) the stopping of an automobile for questioning as to residence is a "minor interference" with privacy; (2) visible manifestations of police presence provide assurance to motorists that the stop is authorized; (3) the reasonableness of checkpoint stops depends upon factors not susceptible to the distortion of hindsight; and (4) the need to substitute the judgment of a magistrate for that of the field officer is reduced when the decision to seize is not entirely in the hands of the officer and deference is to be given to the administrative decisions of supervisory personnel. 428 U.S. at 565, 566.



With respect to the State's interest in conducting DUI roadblocks, the issue is not whether the use of checkpoints in isolation is more effective than other means in combating the DUI problem, but whether the particular law enforcement needs served by checkpoints, when employed in conjunction with other efforts, can be met without reliance on their use. *See Martinez-Fuerte*, 428 U.S. at 556, n. 14. As noted in *People v. Scott*, 63 N.Y.2d 518, 524, 473 N.E.2d 1, 6, 483 N.Y.S.2d 649, 655 (1984), "the State is entitled in the interest of public safety to bring all available resources to bear, without having to spell out the exact efficiency coefficient of each component and of the separate effects of any particular component." Nonetheless, a recent study conducted by the Illinois State Police, under the direction of Jeremy Margolis,[4] indicates that roadside safety checks result in an efficient allocation of resources in the war against drunk driving when compared against roving patrols. While roving patrols proved to be more efficient in most cases where DUI charges resulted,[5] the roadside checks proved more efficient when all alcohol-related charges were taken into consideration.[6]

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[4] FY-89 R.A.I.D./D.U.I.E. Report, August 18, 1989, Available from Illinois Department of State Police, 401 Armory Building, Springfield, Illinois, 62706

[5] The study, which was conducted in 21 state police districts over a one-year period, found roadside safety checks to be more efficient in terms of DUI arrests per man-hours in one of the twenty-one districts. Overall, roving patrols resulted in one DUI/drug arrest for every 16.12 hours expended. Roadside safety checks required 30.49 man-hours.

[6] The study found the checks to be more efficient in terms of alcohol-related arrests per man-hours in 8 of the 21 participating state police districts as well as on the state-wide average. Overall, roving patrols resulted in one alcohol-related citation for every 6.46 man-hours expended. Roadside checks required 5.76 man-hours.

The statistics used by the court below do not address this efficiency issue. While recent enactment of tougher DUI laws, enhancement of roving patrols, and education of the public may well be advancing the fight against drunk driving to some extent, making a "dent" in the problem can hardly be considered satisfactory where the potential for death and serious injury is involved. None of the alternative methods of enforcement addresses the need to detect drinking drivers who will not manifest intoxicated behavior until confronted with an emergency on the road and the need to deter drinkers who perceive themselves capable of driving cautiously. During the one-year test period completed in Illinois, Roadside Safety Checks resulted in 228 DUI/drug arrests and 1207 total alcohol-related citations.

In *Martinez-Fuerte*, the Court specifically noted that the practice of stopping automobiles briefly for questioning to enforce laws regarding driver's licenses, safety requirements, weight limitations and similar matters had a long history evidencing its utility. This is accepted by motorists as incident to highway use. 428 U.S. at 560, n. 14. Similarly, the Court in *Delaware v. Prouse*, 440 U.S. 648, 663 (1979), suggested the stopping of all on-coming traffic as a possible alternative to random stops to check licenses and registration. Moreover, while the defendant in *Texas v. Brown*, 460 U.S. 730 (1983), did not contest the legality of his late-night stop at a temporary license checkpoint, the Court, citing *Prouse*, affirmatively stated that the validity of the procedure was beyond dispute. 460 U.S. at 740-41. Finally, the amici States note that the NTSB study reflects that the very public subjected to this law enforcement method appears to overwhelmingly approve of its



use. While public approval alone cannot serve as a basis for allowing a seizure, it does serve as evidence of the public's recognition of the minimal scope of the intrusion inherent in a stop of this nature. The amici States ask this Court to agree with those drivers in concluding that thirty-second delay is a very small price to pay for the knowledge that the vehicles around you meet essential basic safety standards and are being driven by sober licensed drivers.

## CONCLUSION

For all the foregoing reasons, the amici States respectfully request this Court to reverse the decisions of the Michigan courts.

Respectfully submitted,

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